

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

STATE OF WASHINGTON,

Plaintiff,

v.

THE GEO GROUP, INC.,

Defendant.

CIVIL ACTION NO. 3:17-cv-05806-RJB

WASHINGTON'S RESPONSE TO
DEFENDANT THE GEO GROUP,
INC.'S MOTION FOR SUMMARY
JUDGMENT

NOTE ON MOTION CALENDAR:
November 30, 2018

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	BACKGROUND.....	1
III.	LEGAL STANDARD.....	3
IV.	ARGUMENT	3
A.	Intergovernmental Immunity Does Not Bar Washington’s Minimum Wage Claim.....	3
1.	Washington’s Minimum Wage Laws Do Not Directly Regulate Federal Entities or Endeavors	4
2.	Washington’s Minimum Wage Laws Do Not Discriminate Against the Federal Government or Federal Contractors.....	6
a.	Washington’s minimum wage laws are generally applicable to all private employers – not just federal contractors.....	7
b.	Washington’s minimum wage laws do not target federal contractors or meddle in federal activities.....	9
B.	Washington Disputes That Northwest Detention Center Is a Federal Detention Facility	9
V.	CONCLUSION	11

TABLE OF AUTHORITIES

Cases

<i>Alabama v. King & Boozer</i> , 314 U.S. 1 (1941)	8
<i>Blackburn v. United States</i> , 100 F.3d 1426 (9th Cir. 1996)	4
<i>Boeing Co. v. Movassaghi</i> , 786 F.3d 832 (9th Cir. 2014)	5, 9
<i>Bordell v. Gen. Elec. Co.</i> , 164 A.D. 2d 497 (N.Y. App. Div. 1990)	5
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	3
<i>Davis v. Team Elec. Co.</i> , 520 F.3d 1080 (9th Cir. 2008)	3
<i>Dep’t of Labor & Indus. v. Lanier Brugh</i> , 147 P.3d 588 (Wash. 2006)	7
<i>Doe v. United States</i> , 831 F.3d 309 (5th Cir. 2016)	11
<i>Helvering v. Gerhardt</i> , 304 U.S. 405 (1938)	4
<i>In re Nat’l Sec. Agency Telecomms. Records Litig.</i> , 633 F. Supp. 2d 892 (N.D. Cal. 2007)	6, 7, 8
<i>M’Culloch v. Maryland</i> , 17 U.S. 316 (1819)	3
<i>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986)	3
<i>North Dakota v. United States</i> , 495 U.S. 423 (1990)	passim
<i>Penn Dairies, Inc. v. Milk Control Comm’n of Pa.</i> , 318 U.S. 261 (1943)	8
<i>Phillips Chem Co. v. Dumas Indep. Sch. Dist.</i> , 361 U.S. 376 (1960)	7
<i>South Carolina v. Baker</i> , 485 U.S. 505 (1988)	4
<i>U.S. Postal Serv. v. City of Berkeley</i> , No. C 16-04815-WHA, 2018 WL 2188853 (N.D. Cal. May, 14, 2018)	8
<i>United States v. California</i> , 314 F. Supp. 3d 1077 (E.D. Cal. 2018)	6, 9
<i>United States v. City of Arcata</i> , 629 F.3d 986 (9th Cir. 2010)	3, 4, 6
<i>United States v. City of Detroit</i> , 355 U.S. 466 (1958)	8
<i>United States v. County of Fresno</i> , 429 U.S. 452 (1977)	4, 6
<i>Washington v. United States</i> , 460 U.S. 536 (1983)	6, 8

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Statutes

Wash. Rev. Code § 49.46.010(3)(a)-(p) 7

Wash. Rev. Code § 49.46.010(3)(k) 8

Rules

Fed. R. Civ. P. 56(a) 3

I. INTRODUCTION

Once again, The GEO Group, Inc. (“GEO”) attempts to escape the straightforward application of Washington’s minimum wage laws by shrouding itself in the cloak of the federal government. This time, GEO argues that intergovernmental immunity requires Washington to exempt the Northwest Detention Center (“NWDC”) – a privately owned, for-profit detention facility – from its minimum wage requirements. This argument is strained at best, and ignores basic facts about Washington’s minimum wage laws and NWDC.

Intergovernmental immunity does not invalidate Washington’s minimum wage laws, which are longstanding laws of general application that do not target the federal government or its contractors. Nor is the application of Washington’s statutory exemption for detention facilities operated by a state, county, or municipal government discriminatory against the federal government or private detention contractors: Washington’s minimum wage laws do not extend to federally owned facilities but do apply to all *private* employers regardless with whom they contract. And even if intergovernmental immunity was possibly at issue in this case – and it is not – GEO’s motion should also be denied because it relies on contested facts that must be construed in light most favorable to Washington, including GEO’s contention that NWDC is a “federal” detention facility. GEO has admitted, and the record clearly shows, that NWDC is a private, non-governmental facility. GEO’s motion should be denied.

II. BACKGROUND

GEO, a for-profit corporation, has operated the NWDC since November 2005. *See* Baker Decl. ¶ 3, Ex. A (GEO’s response to Request for Admissions 2). GEO owns the physical facility that houses NWDC as well as the property on which it sits. *See* Baker Decl. ¶ 3, Ex. A (GEO’s response to Requests for Admissions 1-6). There, GEO provides U.S. Immigration Customs and Enforcement (“ICE”) “detention management services including the facility, detention officers, management personnel, supervision, manpower, training, certifications, licenses, drug testing, relief officer(s), uniforms, equipment, and supplies . . . and vehicles necessary to provide

1 detention management and transportation services.” GEO-ICE Contract, ECF 19 at 48. GEO
2 also operates a Voluntary Work Program (“VWP”) at NWDC, where GEO pays detainee
3 workers either \$1 per day or food for work performed. *See* Baker Decl. ¶ 3, Ex. A (GEO’s
4 response to Request for Admissions 1). When GEO provides detentions services to ICE at
5 NWDC, ICE requires GEO to comply with all applicable state and local laws – including state
6 and local labor laws. GEO-ICE Contract, ECF 19 at 48; Johnson Decl., ECF 91 ¶ 14 (confirming
7 this contract requirement on behalf of ICE’s Custody Management Division).

8 As a private contractor, GEO retains significant discretion in how it operates the NWDC.
9 *See id.* ¶ 12. In contrast to federal facilities wherein ICE administers its own VWP, GEO
10 manages the VWP at NWDC according to a program “developed by the Contractor, in this case
11 GEO.” *Id.* In addition, the GEO-ICE contract permits GEO to seek approval to house both ICE
12 and non-ICE detainees, and to charge a “separate bed day rate” to different agencies for which
13 it provides detention services. GEO-ICE Contract, ECF 19 at 53.

14 On September 20, 2017, Washington sued GEO for its failure to pay detainee workers
15 Washington’s minimum wage.¹ ECF 1-1 at 2-8. On October 16, 2017, GEO filed its first motion
16 to dismiss, arguing that Washington’s claims were preempted. ECF 10. This Court denied the
17 motion in its entirety. ECF 29. On March 20, 2018, GEO again moved to dismiss Washington’s
18 claims, arguing that relief could not be afforded without joining ICE and that Washington’s
19 claims were barred by sovereign immunity. ECF 51 at 9-10. This Court again rejected GEO’s
20 arguments, holding that ICE was not a necessary or indispensable party, and that sovereign
21 immunity did not bar Washington’s claims. ECF 58 at 12.

22 GEO now asks this Court a third time to allow GEO to continue paying detainee-workers
23 \$1 per day because of GEO’s proximity to a federal agency. GEO moves for partial summary
24

25
26 ¹ Washington also brought a claim for unjust enrichment that is not at issue in GEO’s Motion for
Summary Judgment on Plaintiffs’ First Cause of Action, ECF 149.

1 judgment, arguing that Washington’s minimum wage claim is barred by the doctrine of
2 intergovernmental immunity. *See* ECF 149 at 6-10.

3 **III. LEGAL STANDARD**

4 Summary judgment is proper where “the movant shows that there is no genuine issue as
5 to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
6 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue
7 of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In assessing whether a party has met
8 its burden, the underlying evidence must be viewed in the light most favorable to the non-moving
9 party, with all inferences drawn in the non-moving party’s favor. *Matsushita Elec. Indus. Co. v.*
10 *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1088
11 (9th Cir. 2008).

12 **IV. ARGUMENT**

13 Intergovernmental immunity is no bar to Washington’s minimum wage claim because
14 Washington law does not target or discriminate against the federal government or federal
15 contractors. The state law exemption for government-owned detention facilities in no way
16 changes this result. At minimum, the Court should deny GEO’s motion because the foundational
17 facts of whether NWDC is a “federal” facility are vigorously contested.

18 **A. Intergovernmental Immunity Does Not Bar Washington’s Minimum Wage Claim**

19 The doctrine of intergovernmental immunity stems from *M’Culloch v. Maryland*, which
20 established that the states have no power, by taxation or otherwise, to control, regulate or limit
21 the federal government. 17 U.S. 316, 326-30 (1819). Courts take “a functional approach to
22 claims of governmental immunity, accommodating of the full range of each sovereign’s
23 legislative authority.” *United States v. City of Arcata*, 629 F.3d 986, 991 (9th Cir. 2010) (quoting
24 *North Dakota v. United States*, 495 U.S. 423, 435 (1990)). Under the functional approach,
25 whatever burdens are imposed on the federal government by a neutral state law “are but normal
26 incidents of the organization within the same territory of two governments” and will not run

1 afoul of intergovernmental immunity. *North Dakota*, 495 U.S. at 435 (citing *Helvering v.*
2 *Gerhardt*, 304 U.S. 405, 422 (1938)). As such, “[a] state regulation is invalid only if it regulates
3 the United States directly or discriminates against the Federal Government or those with whom
4 it deals.” *North Dakota*, 495 U.S. at 435 (citing *South Carolina v. Baker*, 485 U.S. 505, 523
5 (1988)); *United States v. County of Fresno*, 429 U.S. 452, 460 (1977)).

6 As GEO does not argue that Washington’s minimum wage laws directly regulate the
7 federal government, presumably the sole basis for GEO’s motion is that Washington’s minimum
8 wage laws are discriminatory. That argument ignores the longstanding operation of
9 Washington’s generally applicable minimum wage laws, which in no way target the federal
10 government or its contractors. Instead, Washington’s laws require all private employers in
11 Washington – including GEO – to pay their employees the minimum wage regardless of any
12 association with the federal government.

13 **1. Washington’s Minimum Wage Laws Do Not Directly Regulate Federal**
14 **Entities or Endeavors**

15 By failing to brief the argument that Washington’s minimum wage laws directly regulate
16 federal entities or endeavors, GEO has waived it. However, even if GEO claims that it has not
17 waived the argument that Washington’s minimum wage laws directly regulates the federal
18 government, such an argument would fail. Courts find that the application of a state law is barred
19 by intergovernmental immunity only where there is “direct and intrusive regulation by the State
20 of the Federal Government.” *Blackburn v. United States*, 100 F.3d 1426, 1435 (9th Cir. 1996).
21 See *City of Arcata*, 629 F.3d at 991 (noting that impermissible regulation occurs where local
22 laws “seek to directly regulate the conduct of agents of the federal government”).

23 Washington’s minimum wage laws do not directly regulate the federal government.²
24 This is evidenced by the fact that Washington’s minimum wage laws do not purport to require

25 ² As GEO has strenuously argued, the intergovernmental immunity component of the sovereign immunity
26 doctrine bars Washington from directly regulating the federal government. See ECF 149 at 6-8. Due to these core
principles of federalism, Washington’s minimum wage laws do not regulate the federal government’s pay practices

1 the federal government to pay Washington’s minimum wage to federal employees working in
2 Washington State. Instead, Washington’s minimum wage laws regulate all employers – like
3 GEO – that operate in Washington State.

4 GEO may rely on *Boeing Co. v. Movassaghi*, 786 F.3d 832 (9th Cir. 2014) for the
5 proposition that regulation of GEO may alter the terms of a federal agency’s contract, which in
6 turn would constitute impermissible regulation of the federal government. While the proposition
7 is true, that argument holds no water here. Unlike in *Boeing*, GEO’s compliance with
8 Washington’s minimum wage laws would not alter the performance or terms of the GEO-ICE
9 Contract. *See* 768 F.3d at 840 (finding that California sought to directly regulate the Department
10 of Energy (“DOE”) by requiring it to alter its own contract with Boeing and “replac[ing] the
11 federal cleanup standards that Boeing has to meet to discharge its contractual obligation to DOE
12 with the standards chosen by the state”). Here, ICE’s contract with GEO grants GEO wide
13 latitude to create and implement a VWP and its governing policies and protocols. *See* GEO-ICE
14 Contract, ECF 19 at 48; Johnson Decl., ECF 91 ¶ 12. Because ICE gave GEO discretion to
15 implement the VWP – including setting the pay for detainee workers – requiring GEO to comply
16 with Washington’s minimum wage laws would not alter any aspect of the GEO-ICE Contract or
17 supplant any federal standards imposed by ICE. As such, applying Washington’s minimum wage
18 laws to GEO’s VWP does not trigger intergovernmental immunity concerns because it is not a
19 direct regulation of a federal entity. *See Bordell v. Gen. Elec. Co.*, 164 A.D. 2d 497, 498 (N.Y.
20 App. Div. 1990) (finding application of a state whistleblower statute to a federal contractor did
21 not constitute direct regulation where “it [did] not . . . require the federal facility to cease or alter
22 its operations in any way”). In fact, the contrary is true, because GEO is required to comply with
23 Washington’s minimum wage laws through its contract with ICE. *See* GEO-ICE Contract, ECF

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26 at any federal detention facility located in Washington State – *i.e.* the Federal Detention Center, SeaTac which is
owned and operated by the Bureau of Prisons. However, NWDC is not a federal facility. It is a private detention
facility owned and operated by GEO – a multinational for-profit corporation.

19 at 48 (requiring GEO to comply with “[a]pplicable federal, state and local labor laws and codes”).

2
3 **2. Washington’s Minimum Wage Laws Do Not Discriminate Against the**
4 **Federal Government or Federal Contractors**

5 Washington’s minimum wage laws do not discriminate against the federal government
6 or entities that contract with the federal government.

7 A “[s]tate does not discriminate against the Federal Government and those with whom it
8 deals unless it treats someone else better than it treats them.” *Washington v. United States*, 460
9 U.S. 536, 544-45 (1983). “The nondiscrimination rule finds its reason in the principle that the
10 States may not directly obstruct the activities of the Federal Government.” *City of Arcata*, 629
11 F.3d at 991 (quoting *North Dakota*, 495 U.S. at 437-38). When a state law is alleged to operate
12 discriminatorily, federal courts apply intergovernmental immunity with “restraint,” meaning that
13 “[t]he nondiscrimination analysis should not ‘look to the most narrow provision addressing the
14 Government or those with whom it deals’” because even “[a] State provision that appears to
15 treat the Government differently on the most specific level of the analysis may, in its broader
16 regulatory context, not be discriminatory.” *In re Nat’l Sec. Agency Telecomms. Records Litig.*,
17 633 F. Supp. 2d 892, 903-04 (N.D. Cal. 2007) (quoting *North Dakota*, 495 U.S. at 438).
18 “Applying these principles, the [Supreme] Court has required that regulations be imposed
19 equally on all similarly situated constituents of a state and not based on a constituent’s status as
20 a government contractor or supplier.” *In re Nat’l Sec. Agency Telecomms. Records Litig.*, 633 F.
21 Supp. 2d at 903 (citing *County of Fresno*, 429 U.S. at 462-64).

22 Intergovernmental immunity bars a local government’s regulation if: (1) it treats those
23 who work with the federal government differently simply because of their relation to the federal
24 government; or (2) is a “clear attempt to ‘meddl[e] with federal government activities indirectly
25 by singling out for regulation those who deal with the government.’” *United States v. California*,
26 314 F. Supp. 3d 1077, 1096 (E.D. Cal. 2018) (citing *In re Nat’l Sec. Agency Telecomms. Records*

1 *Litig.*, 633 F. Supp. 2d at 903). *See also Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S.
2 376, 383 (1960) (noting that to determine whether a regulation is impermissibly discriminatory,
3 courts first determine how other similarly situated entities are treated). A state law will not
4 implicate intergovernmental immunity where it “is imposed on some basis unrelated to the
5 object’s status as a Government contractor” and is “imposed equally on other similarly situated
6 constituents of the State.” *North Dakota*, 495 U.S. at 438.

7 GEO argues that Washington’s minimum wage exemption for “[a]ny resident, inmate,
8 or patient of a state, county, or municipal correctional, detention, treatment or rehabilitative
9 institution” is discriminatory against the federal government and federal contractors. *See* ECF
10 149 at 1, 3-4, 9-12. GEO’s argument misses the mark.

11 **a. Washington’s minimum wage laws are generally applicable to all**
12 **private employers – not just federal contractors**

13 GEO makes much of Washington’s minimum wage exemption for detainees in
14 government-owned institutions, arguing that that its detention business constitutes “identical
15 circumstances” and application of Washington’s minimum wage law to detainee workers at
16 NWDC is discriminatory against GEO because of its status as a federal contractor. ECF 149 at
17 11. That is flatly wrong.

18 Washington’s minimum wage exemption for detainee workers in governmental detention
19 facilities is not discriminatory against GEO because of its relationship to the federal government.

20 *First*, Washington’s minimum wage laws do not treat GEO – or any federal contractor –
21 differently than any other private Washington employer. Instead, and unless included in an
22 express statutory exemption, all private employers across the state are subject to Washington’s
23 minimum wage laws. *See* Wash. Rev. Code § 49.46.010(3)(a)-(p) (enumerating limited
24 exceptions to minimum wage requirements); *Dep’t of Labor & Indus. v. Lanier Brugh*, 147 P.3d
25 588, 592-95 (Wash. 2006) (applying Washington’s minimum wage laws to federal contractor).
26

1 State regulations that apply across-the-board to businesses regardless of whether they
2 hold a federal contract have repeatedly been upheld against constitutional challenge. *See, e.g.,*
3 *Washington*, 460 U.S. at 545 (upholding state law where “[t]he tax on federal contractors is part
4 of the same structure, and imposed at the same rate, as the tax on the transactions of private
5 landowners and contractors”); *North Dakota*, 495 U.S. at 437 (“price control regulations and
6 taxes imposed on Government contractors . . . have repeatedly been upheld against constitutional
7 challenge”) (citing *United States v. City of Detroit*, 355 U.S. 466, 472-74 (1958)); *Penn Dairies,*
8 *Inc. v. Milk Control Comm’n of Pa.*, 318 U.S. 261, 279-80 (1943); *Alabama v. King & Boozer*,
9 314 U.S. 1, 8 (1941)). *See also U.S. Postal Serv. v. City of Berkeley*, No. C 16-04815-WHA,
10 2018 WL 2188853, at * 3 (N.D. Cal. May, 14, 2018) (finding no discriminatory treatment of the
11 federal government where city’s historic district designation – that was “imposed equally on
12 other similarly situated constituents of the State” – limited government’s options for selling or
13 renovating an old post office). This is because such laws “are but normal incidents of the
14 organization within the same territory of two governments.” *In re Nat’l Sec. Agency Telecomms.*
15 *Records Litig.*, 633 F. Supp. 2d at 903-04 (quoting *North Dakota*, 495 U.S. at 435).

16 *Second*, Washington law exempts detainees workers in government detention facilities
17 from the minimum wage. *See Wash. Rev. Code* § 49.46.010(3)(k). Washington law does not
18 afford the same exemption to private entities operating detention facilities. GEO is not a unit of
19 government. It is a private business operating a detention facility for monetary gain. Unlike a
20 government-owned detention facility, GEO must follow Washington’s minimum wage laws
21 because no exception applies to it. This is true regardless of whether GEO chooses to detain
22 people pursuant to a contract with ICE or another entity.

23 As Washington’s minimum wage laws apply to all private employers equally, they do
24 not target GEO as a federal contractor nor trigger intergovernmental immunity concerns.
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1 **b. Washington’s minimum wage laws do not target federal contractors**
2 **or meddle in federal activities**

3 The case that GEO relies upon most heavily, *Boeing*, provides no support for its argument
4 that Washington’s law is discriminatory. *See* ECF 149 at 10-12 (citing *Boeing Co.*, 768 F.3d 832
5 (9th Cir. 2014)). In *Boeing*, the Ninth Circuit held that California’s site-specific regulations
6 governing radioactive cleanup at Santa Susana Field Laboratory were impermissibly
7 discriminatory and triggered intergovernmental immunity. 768 F.3d at 842-43. The court found
8 the radioactive cleanup regulations discriminatory because they were passed over and above the
9 state’s generally applicable environmental laws in order to target a specific property that the
10 federal government had contaminated. *Id.* at 841. The result of California’s additional layer of
11 regulation specific to the Santa Susana Field Laboratory was that federal actions taken on that
12 property – either directly or through the contract with Boeing – were subject to differential
13 treatment and more intense regulation than any other property in California. *Id.*

14 Washington’s minimum wage laws do not single out the federal government or any
15 specific federal contractor for that kind of differential treatment. *See United States v. California*,
16 314 F. Supp. 3d 1077, 1093 (E.D. Cal. 2018) (holding that state regulations imposed on private
17 detention facilities that contract with the federal government do not trigger intergovernmental
18 immunity concerns). Simply put, application of Washington’s minimum wage laws in no way
19 interferes or meddles with federal interests including the GEO-ICE Contract. *See supra* at 5-6
20 (noting that ICE gave GEO the discretion to structure detainee worker pay in the VWP).

21 **B. Washington Disputes That NWDC Is a Federal Detention Facility**

22 Alternatively, the Court should deny summary judgment because, at minimum, GEO’s
23 attempt to rebrand NWDC as a “federal” detention facility conflicts with the record and GEO’s
24 own admissions.

25 GEO admits that it owns both NWDC and the property on which it sits. Baker Decl. ¶ 3
26 (GEO’s response to Requests for Admissions 1-6). And ICE admits that NWDC is a privately

1 owned facility that ICE contracts with for bed space to house immigrant detainees. Johnson
2 Decl., ECF 91 ¶¶ 7-8. Despite these clean, admitted facts, GEO now argues that because GEO
3 contracts with the federal government for bed space at NWDC that NWDC is a “*federal*
4 detention facility.” ECF at 149 at 4. GEO’s argument relies on deeply disputed facts that must
5 be viewed in the light most favorable to Washington. The Court should reject GEO’s
6 recharacterization for at least four reasons.

7 *First*, GEO’s argument that NWDC is a federal facility because it contracts to detain
8 federal immigrant detainees ignores a critical fact – that GEO has the option and authority to
9 house other detainees, federal or not, at the facility. This means that even under GEO’s logic,
10 NWDC is not strictly limited to federal detainees. *See* GEO-ICE Contract, ECF 19 at 53.
11 Although the NWDC currently houses federal immigration detainees, GEO explicitly reserves
12 the option to detain prisoners or inmates from government entities other than ICE. *Id.* The fact
13 that GEO, a private for-profit company, can seek to house other detainees for pay at its facilities
14 undercuts GEO’s argument that its federal contract magically transforms NWDC into a federal
15 property.

16 *Second*, regardless of whether GEO would like NWDC to be considered a “federal”
17 facility, ICE itself differentiates between private facilities like the NWDC and its own federal
18 facilities. As ICE’s Assistant Director of Customs, Tae Johnson, declared, Services Processing
19 Centers are federally owned and operated immigration detention centers. *See* Johnson Decl.,
20 ECF 91 ¶ 12. The NWDC, however, is not a Service Processing Center. *Id.* The NWDC is a
21 Contract Detention Facility – a privately owned and operated facility that provides detention
22 services to ICE pursuant to a performance-based contract. *Id.* The fact that ICE does not consider
23 NWDC to be a federal immigration detention facility cuts deeply against GEO’s rebranding
24 effort.

25 *Third*, GEO’s reliance on dicta in a Fifth Circuit case does not require this Court to find
26 otherwise. In *Doe v. United States*, the Fifth Circuit passingly refers to Corrections Corporation

1 of America’s practice of providing contract detention services to ICE as “performing a federal
2 function.” 831 F.3d 309, 317 (5th Cir. 2016). However, the *Doe* case itself affirms that “[a]cts
3 of . . . private contractors do not become acts of the government by reason of their significant or
4 even total engagement in performing in public contracts.” *Id.* at 316. GEO has presented no other
5 case that support its labeling NWDC a federal facility and *Doe* helps Washington, not GEO,
6 here.

7 *Fourth*, to the extent GEO relies on an early order from this Court describing the NWDC
8 as “a federal detention facility,” GEO’s argument fails. ECF 149 at 4, 7, 12 (citing ECF 29 at
9 17). This Court has repeatedly found – including in its Order denying GEO’s motion to dismiss
10 Washington’s claims for failure to join ICE – that “GEO is a private corporation that has owned
11 and operated the Northwest Detention Center (NWDC), a 1,575 bed detention facility, since
12 2005.” ECF 58 at 2. *See also* ECF 86 at 6 (noting that neither GEO nor NWDC is a federal
13 entity); ECF 133 at 8 (noting that GEO is a “publicly-traded multinational corporation”). This
14 Court’s early and passing description of NWDC as a federal facility does not alter the facts,
15 admitted by GEO, that NWDC is privately owned. *See Baker Decl.* ¶ 3, Ex. A (GEO’s responses
16 to Requests for Admissions).

17 In sum, NWDC’s status as a private facility is not altered by GEO’s business decision to
18 contract with ICE for detention services, and GEO’s effort to characterize NWDC as a “federal”
19 facility raises a deeply disputed fact issue that must be viewed in light most favorable to
20 Washington.

21 V. CONCLUSION

22 For the foregoing reasons, this Court should deny GEO’s Motion for Summary Judgment
23 on Plaintiff’s First Cause of Action.

24 DATED this 26th day of November, 2018.

25
26 Respectfully submitted,

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s/ La Rond Baker

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that the foregoing document was electronically filed with the United
3 States District Court using the CM/ECF system. I certify that all participants in the case are
4 registered CM/ECF users and that service will be accomplished by the appellate CM/ECF
5 system.

6 November 26, 2018

7 s/Caitilin Hall
8 CAITILIN HALL, Legal Assistant